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May 18, 2000

ENTERED
Office of the Secretary

MAY 19 2000

Re: STB Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures
Our File: 2452.63

Part of
Public Record

VIA UPS NEXT DAY

Surface Transportation Board
Office of the Secretary
Case Control Unit - ATT. STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, D.C. 20423-0001

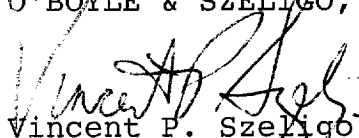
Dear Sir or Madam:

Enclosed are the original and twenty-five copies of the Comments of U.S. Clay Producers Traffic Association, Inc. on the proposed Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1).

A copy of this submission has been served upon all parties on the Board's service list. A diskette with containing a Word Perfect copy of the Notice is also enclosed.

Very truly yours,

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.


Vincent P. Szeligo

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Enclosures

cc: US Clay Producers Traffic Association
All Parties on EP 582.1 Service Orders

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Ex Parte No. 582 Sub-No. 1

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.

I. INTRODUCTION.

To a large extent, the U.S. Clay Producers Traffic Association, Inc. ("Clay Producers") file this statement to repeat the comments submitted in Ex Parte No. 582, filed February, 2000. A review of the Surface Transportation Board's decision in this earlier proceeding demonstrates that in addition to competitive concerns raised by many parties, the issue of whether and how shippers should be compensated for damages caused by the type of major service disruptions seen following the UP/SP and CSX/NS/CR transactions is a pressing concern of a great many parties. In fact, we note that the railroads involved in the BNSF/CN transaction appeared willing to make service guarantees in recognition of the principle that where damage is caused by a miscalculation, the carriers, not the shipper, should bear the cost .

Clay Producers urge the Surface Transportation Board ("Board") to consider fully exercising the existing power that has been delegated to it to hold Class I railroads fully accountable for any merger related miscalculations. Any new procedures should be applied retroactively to address problems arising from the recent major rail consolidations. These are major transactions which have caused or have the potential for causing serious harm to all regions of the country, thousands of businesses and hundreds of thousand individuals. The major Class I railroads should not be allowed to gamble. They must be held responsible for all harm caused by poorly planned mega-mergers. If it is clearly expressed in regulations that railroads will be held fully accountable for damage caused

by miscalculation, the public will be protected because railroads will no longer enter into mergers lightly.¹

Clay Producers² are presently suffering from the latest transaction - that involving the carving up of Conrail - and based on the group's experience, the comments and suggestions set forth below should be considered.

II. COMMENTS

Without exception, all members of Clay Producers report that the recent consolidation of Class I railroads has caused them severe, direct and indirect financial injuries and has forced them to restructure their long standing transportation practices which are by necessity tied to rail transportation.³ In general, as consumers of rail services, the Clay Producers have yet to see a benefit from the recent consolidations. In particular, these shippers are reeling from the problems caused by the major Conrail asset acquisitions by CSX Transportation and Norfolk Southern Railway Company. These carriers are the two principal servicing railroads for Clay Producer members.

Clay Producers believe that railroads currently fail to accurately consider their liability for merger related costs. Perhaps, railroads discount their potential liabilities based on the knowledge

¹ It appears that Union Pacific expects to be able to pass on all service disruption costs caused by its miscalculations in proceeding with the acquisition of SP. See Western Coal Traffic League v. Union Pacific Railroad Company, STB Docket No. 33726, May 10, 2000. If a railroad is to be held accountable for its mistakes, it should not expect to pass the cost of its mistakes on to shippers.

² U.S. Clay Producers Traffic Association, Inc. (Clay Producers) is a non-profit association of producers of clay engaged in producing and shipping clay in all modes of transportation from the relatively concise geographic location of clay deposits in Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed to provide information to members concerning transportation of clay by railroads, motor carriers and by water, as a forum for discussion of developments and information concerning regulation by governing authority of clay transportation, and to represent the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of the Clay Producers, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments.

³ Clay Producers utilize a fleet of over 6,600 tank and hopper cars to move approximately 11 million tons of clay annually from a relatively concise geographic area in Georgia, South Carolina and Tennessee to customers located throughout the United States, Canada, Mexico, and the rest of the world. Clay Producers represent over 95% of the clay tonnage shipped. Clay Producers' clay traffic is heavy and not easily handled by truck. It is captive to the railroads since over 60% of the shipments move 500 miles and 40% move over 1,000.

that shippers will face the burden of proof of establishing in civil courts that certain costs are truly caused by merger problems. However, since the Board has broad powers in approving mergers, Clay Producers propose that the Board sets up a mechanism which makes railroads more clearly responsible for bearing the cost of service disruptions. By leveling the playing field, the Board would encourage railroads to more carefully analyze planned mergers. If railroads are compelled to address the possibility of shouldering substantial shipper damage awards, perhaps they will proceed more cautiously.

Clay Producers are also concerned because in a recent public letter authored by the CEO's of CSX, NS, UP and CP reveals the startling fact that the railroads themselves are predicting that they could well act imprudently in response to major BNSF/CN merger. The suggestion from the January 11, 2000 open letter is that these railroads probably will act recklessly if the BNSF/CN merger is approved. This should be a matter of great concern to the Board and a sign that there is a need for clear and express policies which emphasize that railroads which engage in hasty action which causes damage will be held fully accountable through the payment of money damages. The message must be "IF YOU ACT IMPRUDENTLY AND ENTER INTO A MERGER BASED ON MISCALCULATIONS, YOU WILL PAY ALL DAMAGES."

As shippers, Clay Producers have borne the costs of merger miscalculations in terms of increased car costs, customer complaints and substantial administrative time. Clay Producers have dearly paid a substantial price for the Conrail acquisition in terms of additional direct and indirect transportation costs. For example, immediately after the Conrail switch date, Clay Producers have been forced to incur costs for an additional 500 cars. This translates into an additional \$5.5 million dollars per year in added car costs. It is more difficult to estimate the precise cost of the additional administrative time our traffic departments have spent in arranging alternative transportation, responding to customer inquiries about shipments and tracking down lost cars; however, those costs are substantial.

Clay Producers ship raw materials to customers who depend upon a ready supply for their manufacturing operations in the productions of high quality paper, ceramics, sanitary ware,

insecticides, cattle feed paint and adhesives. Service disruptions cause serious problems both for Clay Producers as well as our customers. Clay is a heavy and bulky commodity and customers cannot easily adjust their inventory design to stockpile to protect against rail service delays. Just-In-Time inventory practices have been widely adopted across all manufacturing industries over the past few decades. For our manufactures, the inventory of raw materials involves extensive logistical calculations and any factor which upsets the assumptions can cause a snowball effect of production slowdowns or shutdowns.

Clay Producers are concerned with the announced BNSF/CN merger primarily for its potential downstream effect. If UP, CSX and NS begin reckless consideration of risky combinations just to avoid being second-rate to a monster railroad, they should be warned that liability damages caused by their reckless action will be swiftly imposed..

III. PROPOSALS

1. Before approving any further Class I rail mergers, the Board should require the railroads to present detailed proof of their ability to smoothly assimilate the merged lines without a deterioration in service as measured by transit times and terminal dwell times.

2. The Board should create an administrative procedure enabling shippers to claim and recover merger related damages. The Board should recognize that miscalculation can occur and that if they do, it is the railroad, and not the shipper, who bears the risk of loss. If shippers have to resort to the civil courts to prosecute their service disruption damage claims, many meritorious claims will not be pursued due to the high cost and uncertainty of litigating complete transportation issues in the general civil courts. With an administrative damage recovery procedure, shippers would not be forced to use thousands of civil courts across the country, each with its own state law precedent, but rather could utilize a streamlined and standardized administrative proceeding adjudicated by Administrative Law Judges who are familiar with concepts such as transit time, terminal dwell and car leasing arrangements and the calculation of damages.

3 To ensure that the railroads do not shift the cost of a merger miscalculation upon shippers, the Board should impose merger conditions on the surviving railroad making it liable to

cover merger related delay/alternative transportation damages suffered by shippers. In addition, the Board should re-examine its May 10, 2000 decision in Western Coal Traffic League v. Union Pacific Railroad Company, STB Docket No. 33726, and consider whether by allowing UP to recognize service disruption costs as normal costs, it is sending the wrong message to railroads, i.e., that railroads will not be held accountable for miscalculation damages because such costs can be passed on to shippers.

4. The Board should increase the procedural burden on Class I railroads by requiring submission of: (a) detailed contingency plans examining the possibility of resulting service disruptions; and, (b) impact statements which project the costs of service disruptions which could be caused by a miscalculation. By requiring railroads to develop this evidence, the Board will force railroads to take a good hard look at the possibility that their actions can cause serious harm.

IV. CONCLUSION

U.S. Clay Producers Traffic Association, Inc., urges the Board to revise its procedures it such as way that merging Class I railroads become more careful and cautious in entering into large scale mergers. Although such measures would increase the burden on merger candidates, and perhaps discourage some deals, increased caution is clearly called for in light of the problems from recent merger miscalculations.

Respectfully submitted,
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Dated: May 18, 2000